



Kopp-Assemmacher & Nusser

UMWELT PLANUNG PRODUKTE

**Use of European public procurement law as
Instrument for the promotion of circular economy management
– Policy Document (EN) –**

on behalf of
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The European waste legal framework of the EU is clearly oriented towards the goals of resource conservation through circular economy management. The use of by-products from the steel industry as slag-based construction materials and as fertilizers serves the purpose of waste prevention and thus circular economy management. Moreover, the circular economy management of mineral waste, which is produced during construction work, e.g. through the dismantling of slag-based building materials, as secondary building materials in new construction and conversion projects is also an important measure of the circular economy management. However, a prerequisite for this is a corresponding demand for these by-products and secondary building materials. The waste policy of the European Union has long been aimed at stimulating such demand in the public procurement sector in an environmentally and circular economy-friendly manner. However, European public procurement law lacks concrete and binding specifications for the inclusion of environmental and circular economy management criteria in public procurement. In order to implement European environmental policy, European public procurement law should therefore be supplemented by a concrete binding regulation. A proposed wording is provided here.

I. EU waste legal framework for the circular economy

According to Art. 1 Directive 2008/98/EC on waste (Waste Framework Directive – WFD), the generation and management of waste should be designed in such a way that it contributes to the protection of the environment and human health. To this end, the harmful effects of the generation and management of waste shall be prevented or reduced, the overall impact of resource use shall be reduced and the efficiency of resource use shall be improved. The following are some of the means by which the objectives of waste legislation are to be achieved:

According to the priority order in the waste hierarchy, waste should primarily be prevented. Otherwise, waste should primarily be prepared for reuse, recycled as a secondary priority and then recovered in some other way, subordinately. At the bottom of the waste hierarchy is the disposal of waste.

Waste prevention, which is at the top of the waste hierarchy priority order, is closely related to the qualification of a substance or object as a by-product. This is because by-products, such as slags from the steel industry, are not waste. If a substance or object is to be qualified as a by-product, this also prevents the generation of waste. In this context, particular reference should be made to the by-product requirement under Art. 5 para. 1 lit. a) WFD, according to which the further use of the substance/object must be certain. This by-product requirement can only be met if there is sufficient demand for the substance/object in question.



Beyond the waste hierarchy that locates recycling according to Art. 5 para. 1 letter c) WFD on the third level of the priority order, especially Art. 8 WFD (extended producer responsibility) and Art. 11 WFD (re-use and recycling) contain Union regulations relating to recycling. According to Art. 11 para. 1 subpara. 2 Hs. 1 WFD, Member States shall take measures to promote high quality recycling.

II. Waste policy of the European Union

In addition to the legal requirements, there are also a number of political programmes at European level in the field of waste management which (also) deal with resource conservation, resource efficiency and the circular economy in general and aim to promote it, as well as qualifying public procurement as a suitable instrument for promoting the circular economy.

1. Previous EU waste policy

In the EU's waste policy to date, among other programmes, the "Europe 2020" strategy, the "2030 Agenda" and the "EU Protocol on Construction and Demolition Waste" are particularly noteworthy.

In its "Europe 2020" strategy from 2010, the EU Commission proposed the flagship initiative "Resource-efficient Europe" in order, among other things, to decouple economic growth from resource use. In this context, the EU Commission stated that one of its tasks **at EU level** would be to develop a framework for the use of market-based instruments, including support for **environmentally friendly public procurement**. The EU Commission also called for the use of regulation, building regulations and market-based instruments such as **public procurement** to reduce the consumption of energy and resources.

In its "Flagship Initiative for a Resource-efficient Europe" of early 2011, the EU Commission identified as one component a strategy to make the EU a circular economy, based on a recycling society with the aim of reducing waste generation and using waste as a resource. To this end, the EU Commission believes that measures to improve resource efficiency should not only target the supply side, but also the demand side, for example through **environmentally friendly public procurement** (green public procurement – GPP).

In addition, the EU Commission published the "EU Protocol on the Management of Construction and Demolition Waste" in September 2016. The protocol aims to increase confidence in the process of managing construction and demolition waste and to convince people about the quality of recycled materials from construction and demolition waste. With regard to public sector representatives working at local, regional and national level, the European Commission considers,



among other things, **appropriate public procurement and appropriate incentives** to be a key area. The EU Commission even considers the construction industry to be a priority sector for **environmentally oriented public procurement**.

2. Programmatic further development of EU waste policy

In order to develop the EU economy into a climate-neutral, resource-efficient and competitive economy, the EU Commission developed a new growth strategy in December 2019 with the European Green Deal. Among other things, it aims to mobilize industry for a clean and recycling-oriented economy and to promote energy- and resource-efficient construction and renovation. The European Green Deal includes a strategy for sustainable products. This also includes **strengthening public procurement**. Public authorities should ensure that their **procurement is environmentally friendly**. According to the European Green Deal, the Commission will propose **further legislation and guidelines for green public procurement**.

An important element of the European Green Deal is the new Circular Economy Action Plan of March 2020, which sets out a strategy for a sustainable product policy. The action plan aims to scale up the circular economy from front-runners to the mainstream economic players. The importance of **environmentally oriented public procurement** for a sustainable product policy is also emphasised. On the basis of the already existing EU criteria for Green Public Procurement (GPP), which provide clear and verifiable environmental criteria for the public procurement of products and services, the Commission intends to consider the **introduction of mandatory requirements**. It is planned to introduce **minimum mandatory green public procurement criteria and targets from 2021**. In the construction industry and the building sector, the "level(s)" instrument for integrating life cycle assessment in public procurement will be used. Level(s) is a voluntary reporting framework to improve the sustainability of buildings.

III. Proposal for the optimisation of the EU legal framework for public procurement

At European level, there are **currently no mandatory rules for an environment or circular economy management oriented public procurement**. In order to fully exploit the potential of public procurement as an instrument for promoting the circular economy, it is therefore advisable to supplement the Public Procurement Directive with appropriate regulations. Where environmental criteria can (but do not have to) already be taken into account in the procurement procedure under the Public Procurement Directive, binding requirements for the inclusion of environmental aspects that can be used to promote the circular economy should be included in the Public Procurement Directive.



Art. 18 of the Public Procurement Directive regulates the principles of procurement. It should be supplemented by a new third paragraph to emphasise the fundamental importance of environmental criteria in public procurement. A **new Art. 18 para. 3 of the Public Procurement Directive** could read as follows:

“When awarding public contracts, contracting authorities shall take into account environmental protection, recycling and resource conservation aspects in accordance with the provisions of this Directive.”

A new Art. 42a should be added after Art. 42 of the Public Procurement Directive on the requirements for technical specifications in the contract documents and before Art. 43 of the Public Procurement Directive on the requirements for labels. The provisions of a new Art. 42a should oblige the contracting authorities to take into account aspects of environmental protection, recycling management and resource conservation when describing the works, supplies or service to be procured in the procurement documents. A **new Art. 42a of the Public Procurement Directive** could read as follows:

“In defining and describing the contractual performance to be procured, contracting authorities must include and allow products, objects and substances which

- 1. have been produced in processes which are resource-saving, energy-saving, water-saving, low-pollutant or, as in particular by-products, low-waste;*
- 2. have been produced by preparing for re-use, by recycling or by other recovery of waste, in particular by using recycled materials, or from renewable raw materials, or can be prepared for re-use, recycled or otherwise recovered when providing the works, supplies or services to be procured;*
- 3. are characterised by durability, ease of repair, reusability and recyclability; or*
- 4. result in less waste or lower-pollutant waste than other products, substances or objects or are better suited to environmentally friendly waste management and circular economy management.*

Contracting authorities may not exclude such products, substances or objects in the descriptive document and other procurement documents. The obligation shall apply provided that the products, objects or substances are suitable for the intended procurement purpose, their procurement or use does not give rise to unreasonable additional costs, sufficient competition is ensured and no other legal provisions conflict with it. If contracting authorities invoke an exception under sentence 3, they



must include the reasons they invoke in the contract award notice referred to in Article 84.”

Art. 67 of the Public Procurement Directive regulates the contract award criteria. After Art. 67 para. 2 of the Public Procurement Directive, which regulates the basic requirements regarding price or cost, using a cost-effectiveness approach, as award criteria, a new paragraph 2a should be inserted in Art. 67 of the Public Procurement Directive, which obliges the contracting authorities to use aspects of environmental protection, recycling management and resource conservation as award criteria. A **new Art. 67 para. 2a of the Public Procurement Directive** could read as follows:

“Where products, objects and substances referred to in Art. 42a sentence 1 may be used in the performance of the works, supplies or service to be procured, the contracting authorities shall identify the most economically advantageous tender on the basis of the best price-quality ratio, which shall be assessed on the basis of criteria relating to environmental protection, circular economy management and resource conservation linked to the subject-matter of the public contract in question.”

Art. 84 of the Public Procurement Directive regulates the requirements for the award notice to be drawn up by the contracting authorities on their procurement procedure. Following the new Art. 42a sentence 4 (see above) proposed here, a new para. 1 sentence 1 letter h) should be inserted in Art. 84 of the Public Procurement Directive, obliging contracting authorities to include in the award notice, where appropriate, the reasons they invoke if they do not wish to include and allow the products, objects and substances referred to in the new Art. 42a sentence 1 in the definition and description of the works, supplies or services to be procured for a reason stated in the new Art. 42a sentence 3. A **new Art. 84 para. 1 sentence 1 letter h) of the Public Procurement Directive** could read as follows:

"Article 84

Individual reports on procedures for the award of contracts

1. For every contract or framework agreement covered by this Directive, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following

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(h) where applicable, the reasons referred to in the third sentence of Article 42a for the contracting authority's decision not to include and allow products, objects or substances referred to in the first sentence of Article 42a."

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